

DOCUMENT RESUME

ED 320 964

TM 015 272

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TITLE Legal Issues in Testing.
INSTITUTION American Institutes for Research, Washington, DC.;
ERIC Clearinghouse on Tests, Measurement, and
Evaluation, Washington, DC.
SPONS AGENCY Office of Educational Research and Improvement (ED),
Washington, DC.
REPORT NO ISBN-0-89785-219-2
PUB DATE Jun 90
CONTRACT RI88062003
NOTE 4lp.
PUB TYPE Information Analyses - ERIC Information Analysis
Products (071) -- Guides - Non-Classroom Use (055)

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS *Court Litigation; *Educational Testing; Elementary
Secondary Education; Test Bias; *Testing Problems

ABSTRACT

Court cases are presented that illustrate some of the issues that courts have dealt with in the area of educational testing. While this study was developed primarily for parents, the booklet should also help school administrators and testing professionals learn about court cases and precedents relevant to some major issues in educational testing. This document is not a comprehensive listing of court cases and precedents on the issue of educational testing, and it does not fully discuss the implications of these cases and precedents. The study simply provides an overview of the following critical issues, each represented by a particular case: racial and cultural bias (Larry P. v. Riles); linguistic bias in tests (Diana v. California State Board of Education); test results that dominate special education placement decisions (Larry P. v. Riles); failure to test sufficiently or at the appropriate time (Hoffman v. Board of Education of New York City); unequal opportunities to learn tested material (Debra P. v. Turlington); assignment to ability tracks without educational justification (Dillon County School District); racial discrimination in the interpretation of college admission test results (Regents of the State of California v. Bakke); gender discrimination in the interpretation of test results (Bray v. Lee); use of the wrong type of test (Sharif v. New York State Education Department); use of test results to deny education (Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania); and access to student academic records (Family Education Rights and Privacy Act of 1974). A list of court cases cited in the study is appended. (TJH)

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LEGAL ISSUES IN TESTING

Ruth Axman Childs
ERIC Clearinghouse on Tests,
Measurement, and Evaluation
American Institutes for Research

With an Introduction by
James C. Gray, Jr., Esquire

TM 015 272

Published by:
The ERIC Clearinghouse on Tests, Measurement, and
Evaluation
American Institutes for Research
3333 K Street, NW
Washington, DC 20007

Printed in the United States of America

Support for this publication was received from the Office
of Educational Research and Improvement (OERI), U.S.
Department of Education, under contract R-88-062003.
The opinions expressed in this report do not necessarily
reflect the positions or policy of OERI or the Department
of Education.

Library of Congress Cataloging-in-Publication Data

Childs, Ruth Axman

Legal Issues in Testing / Ruth Axman Childs; with an
introduction by James C. Gray, Jr., Esquire

38 p.

Includes bibliographical references.

ISBN 0-89785-219-2

1. Educational tests and measurements--Law and
legislation--United States. I. Title.

KF4156.Z9C47 1990

344.73'079--dc20

[347.30479]

90-33929

CIP

ISBN 0-89785-219-2

First Printing June 1990

Preface

While written primarily for parents, this booklet should also help school administrators and testing professionals learn about court cases and precedents relevant to some major issues in educational testing. We expect educational tests to provide valid information and we expect them to be used properly. Yet, disputes have arisen regarding test validity and use.

Legal Issues in Testing is not a comprehensive listing of court cases and precedents on the issue of educational testing, nor does it fully discuss the implications of these cases and precedents. It simply provides an overview of some critical issues.

As you read these cases, please bear in mind that testing policies are usually just, tests are usually administered competently, and test results are usually interpreted properly. Cases such as those discussed here are regrettable but, fortunately, rare. You should carefully evaluate how well each case matches your own situation. Are similar types of tests (aptitude, intelligence, achievement) being used? Are the purposes (placement, graduation) the same? Are the circumstances surrounding the case similar to yours? The closer the match between your situation and the case, the more applicable is the precedent. While you may feel a precedent is applicable, a court of law must make the final determination.

Lawrence M. Rudner, Director
ERIC Clearinghouse on Tests,
Measurement, and Evaluation

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Introduction

Introduction

*James C. Gray, Jr., Esquire**

The cases presented here illustrate some of the issues that courts have dealt with in the area of educational testing. Use of various types of testing has been increasing dramatically in the past decades, particularly as states and school systems look for ways to evaluate the quality of education provided and examine the progress of their students. Given this increased reliance on tests, we can expect to see additional developments in the courts and in state legislatures occurring in the 1990's.

Legal rights come from a variety of sources: the Constitution of the United States, state constitutions, federal laws, state laws, and the interpretations given by the courts to these other sources. Because there are 50 state legal systems (plus the District of Columbia and Puerto Rico), as well as the federal court system, the law in different jurisdictions may differ greatly. The state courts in New York may take the opposite position on a particular question from the state courts in California. A court's position will depend on what the state laws say and how the courts have previously interpreted them. For this reason, as with law generally, it is not always possible to state definitively how different courts will respond to a particular problem. If you encounter a testing problem that you believe will require a legal

**Director, Testing Program, Lawyers' Committee for Civil Rights Under Law*

solution, it is necessary to see whether there are particular laws in your state that may apply to the situation.

As you will see, many of the cases discussed in this publication involve lawsuits brought by and on behalf of a group of individuals who felt harmed by the testing practice at issue. Litigation can be costly and can take years to resolve an issue. If you encounter a problem that seems to be one affecting a number of individuals, it is worth taking the time to see if there are organizations or community groups concerned with problems of this nature which may be able to assist you in seeking an acceptable resolution of the problem or taking legal action if necessary.

When you believe a problem exists, you should try to find out as much information as possible. As a rule, you should be careful to keep records and notes of what people have told you and any correspondence you send or receive on the subject. A letter is an excellent way of ensuring that people focus on your question and provide you with an answer. Such correspondence can also be a helpful tool for a lawyer to have when trying to evaluate how he or she can best help you in trying to resolve your complaint. In many instances, an acceptable resolution may be possible without having to bring the matter before a court.

Key Issues

Racial and Cultural Bias in Tests

Testing minority students has been a concern of both test developers and parents. Most test developers take great pains to remove biased items. While no test can be expected to accurately measure the abilities and knowledge of every student in every situation, a test should not be used to compare students of different races, cultures, or genders if it does not measure accurately the abilities and knowledge of students in each of these groups.

A test that is appropriate for one group of students in one situation may not be appropriate for a second group in a different situation. If the questions on a test are about objects and ideas that are more familiar to one group, then the test may be easier for the individuals in that group. Standards for achievement on such a test may be unfair to the group that is less familiar with the objects and ideas discussed, since it may be more difficult for members of that group to demonstrate their abilities or their knowledge of the material.

The plaintiffs in *Larry P. v. Riles*¹ were black elementary school students from the San Francisco United School District who claimed that they had been improperly placed in classes for the educable mentally

¹*Larry P. v. Riles*, 343 F.Supp. 1306 (N.D. Cal. 1972); 502 F.2d 963 (9th Cir. 1974); 495 F.Supp. 926 (N.D. Cal. 1979); 793 F.2d 969 (9th Cir. 1984).

retarded (EMR classes). The placement had been made on the basis of their scores on an intelligence test that they asserted was inappropriate for use with black students. The plaintiffs pointed out that a larger proportion of black students than of white students were placed in EMR classes in the San Francisco United School District. In that district, while only 28.5 percent of the students were black, 66 percent of the students in the EMR program were black.

The plaintiffs claimed that this and similar imbalances were due, not to differences in abilities, but to the fact that the intelligence tests approved by the State of California for use in placing students in EMR classes had not been standardized for black students. Black students might score lower than white students with the same levels of abilities because of cultural differences affecting how they interpreted and responded to some of the items.

The court concluded that the California schools had been using inappropriate tests for placement of black students in EMR classes and restrained the schools from using standardized intelligence tests as the main consideration in placing black students in EMR classes. If reliance on such tests resulted in a disproportionate number of blacks being placed in those classes, the tests could not be used. To secure permission to use intelligence tests for placing students in EMR classes, the schools would have to submit a written statement declaring that the tests were not discriminatory and had been validated for use in EMR placement decisions. The schools would also have to provide statistics on scores of white students and black students.

Occasionally, tests which are unfair to one race, culture, or gender may still be used if the scores of that group are adjusted to compensate for the group's greater difficulty with the questions. If your child is a member of such a group and you feel his or her scores do not accurately reflect his or her abilities, you should find out if and how these adjustments are made and whether any studies have compared the accuracy of the test for different groups of students. It is important to bear in mind, however, that differences in test scores do not always mean that a test is biased. Other factors, such as fewer opportunities for one group to learn the material, may result in one group scoring lower on a test. In such a case, the policy which created the inequity, rather than the test itself, may be at fault.

Linguistic Bias in Tests

There are many possible reasons why a particular test may not be appropriate for some students. We have discussed how a test may be inappropriate for making comparisons among the students in different groups because the test assumes that the students in the groups are equally familiar with the objects and ideas contained in its questions. A test may also be inappropriate for as simple a reason as language; that is, some students may not understand the language in which the test is written.

In *Diana v. California State Board of Education*,² the issue was again the appropriate use of intelligence tests. Intelligence tests were being administered in English to Mexican-American students who scored poorly on the tests and were, as a consequence, placed in EMR classes. Beyond the difficulties presented by cultural differences, these students also had difficulties with the language of the tests. When the tests were administered by a bilingual psychologist and the students were allowed to answer in either English or Spanish, the scores of the students increased.

This case did not go to trial, but an agreement was reached that required the schools to test students both in their first language and in English and restricted the administration of the vocabulary section and other largely verbal sections of the tests. The agreement also required that state psychologists develop and standardize an

²*Diana v. California State Board of Education*, Civ. No. C-70-37 RFR (N.D. Cal. Jan. 7, 1979 and June 18, 1973).

intelligence test that would be appropriate for non-English-speaking students.

In order to accurately measure the intelligence or achievement of a student, the school must use a test that provides that student with a fair opportunity to demonstrate his or her abilities or knowledge. Cases such as this one have prompted the development of a number of tests designed to give language minority students the best possible chance to demonstrate their intelligence or their knowledge. Using one of these tests decreases the probability that a student will be placed in the wrong educational program. If the student you are concerned about is not a native speaker of English, insist that the school use an appropriate test or that it make appropriate adjustments.

Test Results That Dominate Special Education Placement Decisions

For the student who needs special attention and services, placement in a special education program may be not only appropriate, but vital. For the student who can learn in a regular class, however, placement in a special education program can result in the student failing to achieve his or her academic potential. As a parent, you should be sure that the procedures and tests used by the school to aid in placement decisions are appropriate.

The *Larry P. v. Riles*³ case, described earlier, also has implications for special education placement. The defendants in the case argued that the intelligence test scores used in placing students in classes for the educable mentally retarded could not be blamed for the racial imbalance in the classes. Adaptive behavior tests and teacher evaluations were also used in evaluating the students and, before a student could be placed in a special education program, the consent of the student's parent was required. The plaintiffs presented evidence, however, indicating that knowing that a student had a low test score could affect a teacher's assessment of that student. They also argued that parents, when presented with the information that their child had received a very

³*Larry P. v. Riles*, 343 F.Supp. 1306 (N.D. Cal. 1972); 502 F.2d 963 (9th Cir. 1974); 495 F.Supp. 926 (N.D. Cal. 1979); 793 F.2d 969 (9th Cir. 1984).

low score on an intelligence test, would be unlikely to argue with the school officials about the accuracy of the test results.

The judge agreed with the plaintiffs that intelligence test scores would probably influence the teacher in assessing the student and the parent in deciding whether to allow the student to be placed in the recommended program. Intelligence test scores were, in practice, the strongest consideration in placing students in classes for the educable mentally retarded. Because of the impact of the intelligence test scores, the school district was required to prove that the intelligence tests used were not racially biased. As discussed above, the district was unable to prove that the tests were not biased.

This case underscores the importance of using and interpreting tests appropriately, even when they are not the only basis for the placement of a student in a program. Test scores can influence the ways both you and your child's teacher view and treat your child.

Failure to Test Sufficiently or at the Appropriate Time

The following case illustrates the difficulties that can be caused if tests are not administered and interpreted appropriately. It also illustrates that a school's negligence about testing may not be adequate grounds for a legal claim.

In *Hoffman v. Board of Education of New York City*,⁴ the New York Court of Appeals ruled that the Board of Education of New York City was not negligent in its treatment of a student with a severe speech defect. The student had been administered the Stanford-Binet Intelligence Test at the age of six and had scored one point below the required score for admission to regular classes. Because of this test score, the school psychologist had placed him in classes for the educable mentally retarded. The psychologist noted in the student's record, however, that, because the intelligence test had been largely verbal, it had been difficult to assess the student's mental abilities. Retesting after two years was recommended. In spite of this recommendation, the student was not reevaluated until thirteen years later when he was given another intelligence test to determine his eligibility for placement in an occupational training center. On this second test he was found to be of slightly above normal intelligence.

⁴*Hoffman v. Board of Education of New York City*, Index No. 12593/71, Supreme Court of the State of New York Queens County (Oct. 21, 1976); reversed, 424 N.Y.S. 2d 376 (1979).

The student claimed in his suit that the district had been negligent in hiring incompetent personnel, in not supervising those personnel adequately, in evaluating his intelligence incorrectly, in failing to reevaluate his intelligence, in depriving him of speech therapy, and in misleading his mother as to his true potential. He charged the district with depriving him of an appropriate education and with, as a consequence, decreasing his earning power.

A school board regulation required that intelligence tests be competently administered and the state education code stated that placement based on intelligence test results must be evaluated by an accredited psychologist or psychiatrist. Because of these regulations, a jury awarded \$750,000 to the student. This decision was later reversed, however, based on the principle that the courts should not interfere with the professional judgment of members of a school counseling staff.

Although the results can be devastating to a student, schools are not necessarily liable for misuses of tests and test results. Your child's best protection against such misuses is for you to be knowledgeable about the appropriate uses of various types of tests. If you suspect that your child is being tested inappropriately or is not being tested when testing would be appropriate, you should consider seeking a second opinion from a testing professional.

Unequal Opportunities to Learn Tested Material

Sometimes a test may accurately measure the abilities or knowledge of students and still be used inappropriately if the decisions based on the test scores unfairly penalize some students.

In *Debra P. v. Turlington*,⁵ ten black twelfth-grade students claimed that Florida's minimum competency testing program had not been properly and fairly designed. Under the testing program, students were administered the Florida State Student Assessment Test in the fall of their junior year of high school. Students failing the test were placed in remedial classes to prepare them for later test administrations. The test was readministered to the students in the fall and spring of their senior year and any students who still did not pass the test were awarded certificates of completion and did not receive high school diplomas regardless of their high school grades.

The plaintiffs claimed that they had been denied due process because they had not been given adequate time to prepare for the test. They also claimed that the test was being used to segregate students by race.

⁵*Debra P. v. Turlington*, 474 F.Supp. 244 (1979); 644 F.2d 397 (5th Cir. 1981); 654 F.2d 1079 (denying rehearing *en banc*) (5th Cir. 1981); 564 F.Supp. 177 (M.D. Fla. 1983); 730 F.2d 1405 (11th Cir. 1984).

The court found that the test was not racially biased, but that it was being used in a way that was unfair to minority students. These black students, the court found, had not had the same opportunities as their white peers to learn the material being tested. The court ruled that the test was being used unfairly and barred its use as a requirement for graduation until the 1982-83 school year, the first year in which all students graduating would have spent their entire education in unsegregated schools. The court also found that even though more black than white students were being placed in the remedial classes, this was a temporary result of the earlier inequity in educational opportunities.

In addition, the court stated that it is the responsibility of a school system, when using a test as a basis for granting high school diplomas, to show that the test covers only material that was actually taught to the students.

This case illustrates the need for due process in educational testing. Even though a test is accurate for the population with which it is being used, basing educational decisions on its results may be inappropriate if all of the students have not had the opportunity to learn the material being tested.

Assignment to Ability Tracks Without Educational Justification

Even when tests are used and interpreted appropriately, injustices may occur. In such cases, the fault may lie not with the test, but with the institution that is using the scores from the test as a basis for educational decisions that are not in the best interest of some of the students.

In 1984, the Office of Civil Rights (OCR) of the U.S. Department of Education charged that the Dillon County School District⁶ in South Carolina was practicing racial discrimination by tracking students without educational justification. Most of the district's black students were being placed in the lower ability tracks, while most of the white students were being placed in the higher ability tracks. The school district claimed that by assigning students to classes by ability level, as measured by a standardized test, it was providing the students with better opportunities to learn. The district was, however, unable to produce evidence to defend this claim.

The OCR showed that black students in the district were more likely to move down than up between the ability tracks, while white students were more likely to

⁶Dillon County. Administrative Proceeding in the United States Department of Education, Initial Decision. Docket number 84-VI-16.

move up than down. It also demonstrated that students who began the year with the same achievement test scores, but were placed in different ability tracks, would, by the end of the year, be performing differently. Most students placed in the higher track would be performing better than students placed in the lower track. Based on this finding, the OCR claimed that the lower tracks did not provide the same opportunities for students to learn as did the higher tracks.

The administrative law judge was convinced that the school district did not have educational justification for its practice of grouping students by abilities. Since this practice resulted in racially identifiable classes, the judge concluded that the school district was practicing racial discrimination. The Department of Education was given the authority to withhold all federal financial assistance to the school district until the district started using non-discriminatory grouping procedures.

As this example illustrates, just because a test is appropriate, you cannot assume that the scores from the test will always be used appropriately. Grouping students by their abilities is generally acceptable as long as it has a positive effect on the students. For example, if special help is provided to the students in the lower groups, such a system may be beneficial to the students. However, in the Dillon County School District, no such help was being provided for these students. The county's system could, consequently, not be considered educationally beneficial to the students.

Racial Discrimination in the Interpretation of College Admission Test Results

Since the school or university your child hopes to attend will almost certainly affect his or her potential for future success, you may be concerned about the fairness of college admission policies. The following case illustrates the considerable latitude schools have in determining which applicants they will admit.

In *Regents of the State of California v. Bakke*,⁷ the fairness of the admission practices of the University of California at Davis Medical School was defended. The school had a policy of reserving 16% of its openings for disadvantaged students. Many of the disadvantaged students given these places had lower test scores and undergraduate grades than Bakke. Bakke claimed that this policy was unfair to white applicants since minority students were sometimes considered disadvantaged because of their race.

The U.S. Supreme Court ruled that the specific admission policy of the university was discriminatory because white applicants were absolutely excluded from consideration for 16% of the openings. The Court stated,

⁷*Regents of the State of California v. Bakke*, 438 US 265, 57 L.Ed 2d 750 (1978).

however, that selective institutions are not required to select students only on the basis of their academic qualifications and test scores. A selective institution can try, through its admission policy, to create a diverse student body.

While most schools cannot deny a student admission solely because of his or her race, gender, or religious beliefs, schools do have considerable freedom in deciding which applicants they wish to accept. Most schools consider other factors, such as high school grades and extracurricular activities, in addition to test scores, in making their admission decisions. Some schools will send your child a description of their admission policies with their application forms; you may wish to request such a description from schools that do not. Knowing what factors a school considers in deciding which applicants to accept may help your child to emphasize the activities or qualifications that the school considers in making its decision. This knowledge may also help you to assess your child's chances of being admitted.

Gender Discrimination in the Interpretation of Test Results

In this case, as in several of the preceding cases, a policy, rather than the test, was responsible for the unfair treatment of one group of students.

*Bray v. Lee*⁸ involved the unequal admission requirements of Boston's two prestigious Latin Schools, Girls' Latin and Boys' Latin. Because Girls' Latin accommodates only half as many students as Boys' Latin, the test scores required for admission to Girls' Latin were much higher than the scores for admission to Boys' Latin. The Massachusetts state court ordered that girls who had not obtained high enough scores to be admitted to Girls' Latin, but had scored well enough to be admitted to Boys' Latin, could not be denied admission to Boys' Latin because of their gender.

Ensuring that your child receives fair and appropriate treatment may mean examining not only the characteristics of the tests, but also the policies that determine how the results of the tests are used. While policies that involve the use of test scores will almost certainly be presented by the school or organization as objective and fair, you may still wish to find out whether the particular policy that

⁸*Bray v. Lee*, Civ. No. 70-2002-C (D. Mass. Aug. 27, 1971).

affects your child is supported by sound educational theory or research.

Using the Wrong Type of Test

Different types of tests have different purposes. For example, intelligence or aptitude tests measure a student's potential to learn, while achievement tests measure what a student has learned. Although a student may perform similarly on both types of test, it is a mistake for schools or other educational organizations to try to substitute one type of test for the other.

In a recent case, *Sharif v. New York State Education Department*,⁹ the plaintiffs charged that by using Scholastic Aptitude Test (SAT) scores as the sole basis for its award of state merit scholarships, the New York State Education Department was discriminating against girls who were competing for the awards. Although the girls tended to have higher high school grades than the boys competing for the scholarships, they also tended to have lower scores on the SAT, and so received fewer of the scholarships. The State Education Department acknowledged that SAT scores did not accurately reflect high school performance. The State Education Department argued, however, that, since high school grades from different schools were difficult to compare, the SAT was the best measure available.

The SAT is an aptitude test, not an achievement test. It is intended to predict students' grades during the first year of college and does not claim to measure the achievement of students during high school. The stated

⁹*Sharif v. New York State Education Department*, 709 F.Supp. 345 (S.D.N.Y. 1989).

intention of the New York scholarship program, however, was to base its awards on high school achievement. By basing its awards solely on the results of a test which did not measure high school achievement, the program was, the plaintiffs argued, denying many of the girls competing for the scholarships a fair opportunity to demonstrate their eligibility for the awards. The court ruled that New York could no longer use SAT scores alone as a basis for the scholarship awards and recommended that it consider administering a statewide achievement test or examining high school grades along with SAT scores.

This case illustrates the impact that the use of the wrong type of test by a school or program can have on the educational future of a student or group of students. As a parent, you should find out what the tests being used by your school are designed to measure. You should be sure that when test results are the basis for decisions about your child's educational future, those results are being interpreted appropriately.

Using Test Results to Deny Education

Even if your child is unable to profit from educational or training programs offered by your public school district, he or she is still entitled to receive a free and appropriate education.

*Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*¹⁰ was brought on the behalf of parents whose children had been classified as uneducable and untrainable on the basis of tests administered by the schools. A consent agreement was reached which stated that the State of Pennsylvania could not deny a mentally retarded person between the ages of 6 and 21 access to appropriate public education and training. The agreement also required that the state, before changing the program of a mentally retarded student, notify the parents of the student and provide an opportunity for a public hearing.

Usually you, the parent, must give your consent before your child is transferred to another educational program. This provides you with the opportunity to examine the evidence of your child's abilities, to find out more about the tests that were used and their strengths and weaknesses, and to explore other means of evaluating your child.

¹⁰*Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*, 343 F.Supp. 279 (E.D.Pa. 1972).

Access to Student Academic Records

Federal law protects your right to examine your child's academic records. If these records contain test scores, you have a right to see these scores, as well.

Under the *Family Education Rights and Privacy Act of 1974*,¹¹ also known as the *Buckley Amendment*, educational institutions that receive federal financial assistance are required to allow parents access to their child's personal academic files. Schools also must maintain the confidentiality of these files. Since most public schools receive federal aid, the Buckley Amendment has provided many parents and students the opportunity to examine a student's school records.

Being able to examine your child's scores and to question their use allows you the opportunity to better understand and, if necessary, challenge the data affecting your child's future.

¹¹*Family Education Rights and Privacy Act of 1974 (Buckley Amendment)*, 20 U.S.C. Section 1232g. Regulations at 45 C.F.R. 99.

Appendices

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Additional Reading

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Acknowledgements

This booklet reflects the thoughts of many people. Particular thanks are due to the advisory board of the ERIC Clearinghouse on Tests, Measurement, and Evaluation for suggesting the topic and to the following people for their comments and advice about the content and presentation of this booklet.

Thomas F. Donlon, Esquire, Donlon Associates

James C. Gray, Jr., Esquire, Lawyers' Committee for Civil Rights
Under Law

Janice Redish, American Institutes for Research

Lawrence M. Rudner, American Institutes for Research

Robert Stonehill, U.S. Department of Education

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ISBN 0-89785-219-2